Supreme Court, U.S.
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No. 05-1527

In the Supreme Court of the United States

ROBERT A. SCHMIDT, SHERIFF,
SHAWANO COUNTY, WISCONSIN, PETITIONER

v.

JOSEPH L. VAN PATTEN, RESPONDENT

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The lawyer appointed to represent Joseph Van Patten failed to appear in person at the plea hearing where he surrendered his constitutional rights. While the lawyer did participate by speakerphone, the trial judge did not ask Van Patten's consent to proceed without his lawyer present and did not guarantee Van Patten's ability to confer with his lawyer privately during this critical hearing. The lawyer also was not in a position to observe his client's demeanor and assure himself that his client understood the proceedings and was entering an intelligent and voluntary plea.

This case presents the question whether the Seventh Circuit properly granted Van Patten relief under 28 U.S.C. § 2254 based on its conclusion that his Sixth Amendment claim was governed by *United States* v. *Cronic*, 466 U.S. 648 (1984)—rather than *Strickland* v. *Washington*, 466 U.S. 668 (1984)—and thus that the state courts had reached a decision contrary to this Court's cases by requiring him to prove prejudice.

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INTRODUCTION

This case does not merit further review. Based on the particular facts of this case, the Seventh Circuit held that the state courts had analyzed Joseph Van Patten's Sixth Amendment claim under the wrong legal standard. The Seventh Circuit properly concluded that counsel's failure to appear in person at the plea hearing amounted to a violation of Van Patten's rights under *United States* v. *Cronic*, 466 U.S. 648 (1984). Under *Cronic*, when a defendant is actually or constructively denied counsel at a critical stage in the proceedings, the constitutional violation is presumed to be prejudicial. Rather than applying *Cronic*, however, the state courts here considered Van Patten's claim under *Strickland* v. *Washington*, 466 U.S. 668 (1984), which requires a defendant who seeks relief based on a specific error by his counsel to establish a reasonable probability that the outcome of the proceeding would have been different, but for the error.

While the State of Wisconsin may disagree with the Seventh Circuit's decision, its petition does not point to any basis for a writ of certiorari. There is no unresolved legal question, and the petition does not make any effort to identify a conflict of authority between this decision and those of other circuits. Nor does the State argue that the decision conflicts with relevant decisions of this Court. There is nothing for this Court to resolve. The petition should be denied.

STATEMENT OF THE CASE

I. State Proceedings

The state proceedings began when Van Patten was charged with one count of first-degree intentional homicide following a fatal shooting in Shawano County, Wisconsin.

A. Plea Hearing

As he awaited trial on the charge in this case, Van Patten received word that he would be appearing at a plea hearing in court later that same day. Before he left the county jail, his counsel—James B. Connell—conferred with him by telephone about a plea agreement reached with the prosecutor. Post-Conviction Hrg. Tr. 5. Under this agreement, Van Patten would enter a plea of "no contest" to a charge of first degree reckless homicide with a penalty enhancer for a dangerous weapon. Pl. Hrg. Tr. 3. The agreement did not include a sentencing range. *Id.* at 10. By entering a plea of "no contest," Van Patten would effectively be admitting that he committed all the elements of the crime of first degree reckless homicide.

At the end of his conversation with Connell, Van Patten asked him "if he was going to be there [at the hearing], and he said no." Post-Conviction Hrg. Tr. 6. Van Patten later testified that he had some questions and concerns that he did not have an opportunity to raise with his counsel, including about the interplay between the plea agreement and a related charge then pending in another jurisdiction. *Id.* at 6-8.

At the hearing itself, attorney Connell participated only by speakerphone. Pl. Hrg. Tr. 1. At no point during the hearing did he or the judge ask Van Patten whether he objected to his attorney's participation by speakerphone, nor did they ask whether Van Patten would prefer to move the hearing to a time when his attorney was available to appear in person. Instead, the judge warned Van Patten that any discussions he had with his attorney during the hearing would be "on the record," unless Van Patten made a special request, in which case the court could "perhaps" get Connell "on the line in a private place":

> THE COURT: All right, now, before your plea is entered and accepted by the Court, the Court will ask you certain questions to determine whether or

> not your pleas should be entered and accepted. If you have any trouble understanding any question, take all the time you need to confer with your attorney, and we can perhaps get him on the line in a private place so you could talk to him privately also. Do you understand that?
>
> THE DEFENDANT: Yes, Sir.
>
> THE COURT: Everything here is going to be on the record.
>
> THE DEFENDANT: Yes, your honor. [Pl. Hrg. 6]

At one point the judge noted that "Mr. Van Patten wanted to say something" and asked counsel on the telephone, "Do you object to him saying something?" *Id.* at 22. Counsel responded, "If it's about the visit," referring to the question whether Van Patten would be allowed an hour-long visit at the county jail with his seven-year-old daughter. *Id.* at 21-24. Van Patten's only extended comments on the record at the hearing related to whether he would be able to visit with his daughter.

Van Patten was ultimately sentenced to the maximum possible term of 25 years in prison.

B. Post Conviction Hearing

After retaining different counsel, Van Patten filed a motion to withdraw his plea and for other relief, based in part on his contention that his Sixth Amendment right to counsel had been violated because of his counsel's failure to appear in person at the plea hearing. The State opposed this motion, arguing in relevant part that Van Patten had failed to show ineffective assistance of counsel under *Strickland*. Post-Conviction Mot. Hrg. Tr. 47.

At the post-conviction hearing, Van Patten testified that he had explained to Connell before the plea hearing that he "wanted to go to jury trial" and that he "didn't want [a] plea bargain to begin with." Post-Conviction Hrg. Tr. 9. He also testified that he "was forced to take a plea

bargain" because his counsel had advised him of the prosecutor's threat that if Van Patten "didn't take his plea bargain he'[d] make sure [Van Patten] would die in prison." *Id.* Van Patten testified that he had told another attorney that he did not want a plea agreement and intended to discharge Connell from the case in Shawano County, but that it was his understanding that the judge would not appoint another lawyer for him with only a week to go before trial. *Id.* at 9-10. Thus he believed he would have to appear without an attorney if he chose to discharge his current lawyer and reject the plea agreement. *Id.*

When asked whether he knew how to advise the court if he did not want to enter a plea, Van Patten explained that attorney Connell had advised him not to. According to Van Patten's testimony, Connell told him that if he told the judge he was not satisfied with his lawyer and felt he was being forced to take the plea, the judge would "get mad" and would require him to proceed to trial on the charge of first degree intentional homicide, without any of the lesser included offenses. *Id.* at 13. Van Patten also explained that at the time of the plea, he "didn't know what to do." *Id.* Further, when asked whether he made a request to the Court to speak with his lawyer privately during the hearing, Van Patten explained that he had not done so "because Mr. Connell told [him] just say yes and just go along with everything." *Id.* at 13-14. Van Patten testified that he believes he would not have entered the plea if his attorney had been present that day. *Id.* at 13.

C. Wisconsin Trial Court Decision

In an oral ruling, the court denied Van Patten's motion. *Id.* at 49-52, Pet. at A47-A50. The court included little analysis of Van Patten's argument concerning his advocate's failure to appear in person, commenting bizarrely that Van Patten may have been better off without him present. *Id.* at 50, Pet. at A49 ("if his argument is that he was forced by his attorney to [take the

plea], an attorney on the phone is certainly less intimidating than one standing right next to him").

D. Wisconsin Appellate Court Proceedings

Van Patten appealed, arguing that he was denied the assistance of counsel by virtue of his counsel's participation by speakerphone at the plea hearing, in violation of both Wisconsin law and the Sixth Amendment. The court of appeals affirmed. *See* Pet. at A41-A46. The court acknowledged that Wisconsin Statute § 967.08—which authorizes certain proceedings to be conducted by phone—does not permit an attorney to appear by speakerphone at a plea hearing. Pet. at A43-A44. The court held, however, that this "procedural error" was not a "manifest injustice" sufficient to permit Van Patten to withdraw his no contest plea. *Id.* at A44-A45.

As for Van Patten's Sixth Amendment claim, the court of appeals applied the two-prong analysis in *Strickland* and indicated that in order to satisfy the "prejudice" prong, "the defendant must allege facts to show that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at A45 (citations omitted). The court concluded that counsel's participation in the hearing by telephone did not "interfere[] in any way with [Van Patten's] ability to communicate with his attorney about his plea." *Id.* at A44. The court referred to passages in the plea colloquy in which Van Patten agreed that he had thoroughly discussed the plea with his attorney and was satisfied with his representation. *Id.* The court also noted that Van Patten had not asked to speak privately with his attorney during the colloquy and had raised no objection to the plea during his allocution at sentencing, when his attorney was physically present. *Id.* Accordingly, the court concluded that Van Patten was not entitled to relief under *Strickland*. *Id.* at A46.

Van Patten also sought discretionary review in the Wisconsin Supreme Court, but his petition was denied.

II. Federal Court Habeas Corpus Proceedings

A. Magistrate Judge Recommendation

Van Patten then filed a *pro se* petition for relief under Section 2254, asserting a violation of his Sixth Amendment right to counsel in connection with his plea hearing. On January 17, 2003, Magistrate Judge Goldstein issued an order denying the petition. Rec. 28. The magistrate judge concluded that counsel was "ineffective under *Cronic*," which stands for the proposition that the denial of counsel at a critical stage in the proceedings is presumptively prejudicial. Magistrate Judge's Order (Rec. 28 at 3), Pet. at A34.[1] Nevertheless, the magistrate judge denied relief based on his conclusion that counsel's ineffectiveness under *Cronic* was harmless error, because counsel "did appear at the plea proceeding by telephone" and the court "conducted a significant colloquy with Van Patten to make sure that he understood the ramifications of his plea." Rec. 28. at 7, Pet. at A38-A39. The magistrate judge also noted that Van Patten "had ample time and sufficient reasons to withdraw his plea" before sentencing, and "there is no indication that Attorney Connell would have done anything different if he had been present in person." *Id.*

Although the Clerk of Court initially entered final judgment based on that order, Magistrate Judge Goodstein later vacated the order and directed the Clerk to transfer the matter to a district judge, converting his prior order into a recommendation to the district court. The case was then assigned to Chief Judge Rudolph T. Randa.

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[1] At the same time, the magistrate judge concluded that counsel "was effective under *Strickland*" because Van Patten had not shown that he was prejudiced by trial counsel's error. Magistrate Judge's Order (Rec. 28) at 3, Pet. at A34.

B. District Court Proceedings

Van Patten then filed an answer to the order vacating the judgment, as well as a request for a certificate of appealability. Rec. 39. Along with his answer, he also submitted several letters and requested the appointment of counsel. *Id.*[2] One of these letters—dated October 11, 1995, between the plea hearing and the sentencing—was addressed to Nila Robinson, an attorney whom Van Patten had first contacted months earlier. Pet. at A25. As the district court noted, Van Patten wrote in his letter that he "could see [he] wasn't getting anywhere" with his current attorneys, who had "forced [him] into a plea . . . ." *Id.*

The district court denied Van Patten's petition. Pet. at A18-A30. After considering both the recommendation by the magistrate judge and the various pleadings and additional documentary evidence submitted by Van Patten, the court concluded that Van Patten "ha[d] not demonstrated that he contacted counsel about withdrawing his plea or that he told the judge during sentencing that he wanted to withdraw his plea." Pet. at A27-28. The court further concluded that the state court's finding that Van Patten "only sought to withdraw [the plea] after he was sentenced" was a "credibility determination which has not been rebutted." Pet. at A28. Thus the district court concluded that Van Patten had not proven ineffective assistance of counsel under *Strickland*. It also held that the state court "properly identified and

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[2] Later, Van Patten also filed a "supplemental," which referred to a state disciplinary action against an attorney who had been appointed to represent him in the federal habeas proceedings. Rec. 44. The "supplemental" also argued that Van Patten or his new counsel should have the opportunity to admit certain evidence that his appointed habeas counsel had failed to submit, including the letters he had already submitted as "proof of contact" with other attorneys concerning his plea. *Id.*

applied *Strickland* as the proper legal standard governing Van Patten's ineffective assistance claim." *Id.*

At the same time, the district court concluded that Van Patten's counsel was "ineffective under *Cronic*." *Id.* Without any further analysis, however, the district court accepted Magistrate Judge Goodstein's conclusion that "trial counsel's appearance by telephone was a harmless error even though it was a violation of Van Patten's Sixth Amendment right of effective assistance of counsel." *Id.* On this basis, the court denied Van Patten's petition. Pet. at A29-30.

C. Seventh Circuit Decision

The Seventh Circuit reversed. The Court recognized that a defendant has a right to an attorney's "guiding hand" during a proceeding in which he enters a guilty or "no contest" plea because such a proceeding is a critical stage where defenses may be irretrievably lost if not asserted. Pet. at A7 (quoting *Hamilton* v. *Alabama*, 368 U.S. 52 (1961)). The court also held that the right of an accused to be represented by counsel at such a hearing is "pervasive for it affects his ability to assert any other rights he may have." *Id.* (quoting *Cronic*, 466 U.S. at 654).

Having established the importance of the Sixth Amendment right at the plea hearing, the court then considered whether the claim in this case is governed by *Strickland* or *Cronic*. Pet. at A7-A9. The court concluded that Van Patten's claim was based on a structural defect in the design of the proceeding rather than any specific legal judgment or incorrect information his attorney provided. *Id.* The nature of communication over speakerphone deprived Van Patten of his attorney's guidance and support; he could not turn to his lawyer for private advice, and the lawyer was not in a position to detect and respond to non-verbal cues from his client regarding misunderstandings or a change of heart. *Id.* at A8. In short, the court concluded that the structural limitations and surrounding circumstances deprived Van

Patten of the assistance of counsel at a critical stage in the proceedings—a claim that must be analyzed under *Cronic*. By applying *Strickland* and requiring prejudice, the state court had reached a decision contrary to clearly established federal law.

Finding a *Cronic* violation, the Seventh Circuit then concluded that the district court had erred in finding the error to be harmless. *Id.* at A13. The court held that harmless error analysis is inapplicable "where the denial of counsel contaminated the entire proceeding." *Id.* at A12-13 (citing cases). Thus the court reversed the district court's decision and remanded with instructions to grant the petition for a writ of habeas corpus. *Id.* at A13. The court further instructed that when the case returned to the state trial court, the proceedings could proceed "with a plea of not guilty in place." *Id.*

The State did not seek a stay of the mandate from the Seventh Circuit. Nevertheless (and despite Van Patten's right to a speedy trial), the State has asked the trial judge to delay the trial pending resolution of this matter. Van Patten remains in the State's custody.

REASONS FOR DENYING THE PETITION

The petition for certiorari fails to satisfy any of this Court's usual criteria for granting review. The State has not cited any conflicting decisions by any other federal court of appeals—either on the specific fact pattern presented here or on the broader question of the deference due a state court under Section 2254. There is also no conflict between the Seventh Circuit's decision and the relevant decisions of this Court. The State declares dramatically that this case presents "an issue of critical importance to all federal and the State courts: will the federal courts abide by the limits Congress imposed on the issuance of federal habeas corpus relief?" Pet. at 4. In fact, however, this case simply concerns one court's review of a state court's legal conclusion about which of this

Court's right-to-counsel cases governs a particular factual situation. There is nothing here for this Court to resolve.

Moreover, the State's position on the merits is wrong as a matter of law. Section 2254 allows a federal court to grant relief on a claim first adjudicated in the state courts if that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254 (d). Nothing in that provision limits this Court's decisions to their specific facts. Here, the state court required Van Patten to prove prejudice in a case where he was denied the presence of counsel at a plea hearing. The Seventh Circuit properly concluded that the state court's decision was "contrary to" this Court's decision in *Cronic*, which held that the denial of counsel at a critical stage in the proceedings is presumptively prejudicial. Although this Court has never specifically addressed a claim based on counsel's participation by speakerphone, nothing in the habeas statute precluded the Seventh Circuit from deciding that the facts of this case were materially indistinguishable from those in *Cronic*.

The State is also incorrect in claiming that the Seventh Circuit substituted its own factual determinations for those of the state courts. The Seventh Circuit's comments were in no way inconsistent with the Wisconsin court's factual findings. Further, the material the State cites primarily concerns only whether Van Patten suffered actual prejudice, which is irrelevant under *Cronic*. Thus a decision by this Court on that particular issue would have no impact at all on the judgment in this case.

The notion that counsel should be physically present when his client is pleading guilty is not a new idea. A defendant who is forced to stand alone in the courtroom—without a lawyer at his side to answer questions, observe his demeanor, and assess for himself whether the plea is knowing and voluntary—should not be denied relief on the ground that no lawyer has ever tried such a thing before.

The Seventh Circuit's decision in this case fell well within the bounds of Section 2254. The petition should be denied.

I. The Petition does not identify any conflicts among the circuits or with any relevant decision of this court.

Tellingly, the State does not allege any conflict between the Seventh Circuit's decision and a decision of this Court or any of the federal circuits. Thus this case fails to present the most basic criteria that this Court uses to determine whether to exercise its certiorari jurisdiction.

The only case that the State even suggests is in tension with the Seventh Circuit's decision is *Hill* v. *Lockhart,* 474 U.S. 52 (1985). Pet. at 17 (noting that *Hill* "points to" the inapplicability of *Cronic*). The State argues that *Hill* requires courts to apply *Strickland* to all ineffective assistance claims relating to guilty or no contest pleas. Pet at 13 (*Hill* "clearly establishes that the two-part *Strickland* test applies to claims grounded in ineffective assistance at a plea hearing"). This is a misreading of *Hill* and of this Court's cases generally.

Whether *Strickland* applies rather than *Cronic* turns on the nature of the right-to-counsel claim, not the particular proceeding in which the claim arose. This Court issued its decisions in *Strickland* and *Cronic* on the same day, creating two different regimes for Sixth Amendment cases. In cases where counsel committed a specific error in the representation, this Court requires the defendant to show that the error "actually had an adverse effect on the defense." *Strickland,* 466 U.S. at 693. As the Court has explained, "[a]ttorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial." 466 U.S. at 693; *see also id.* at 702 (Brennan, J., concurring) (*Strickland's* prejudice analysis applies to "claims of ineffective assistance based on allegations of specific errors by counsel—claims which, by their very nature, require courts to evaluate both the attorney's performance and the

effect of that performance on the reliability and fairness of the proceeding") (citations omitted).

In some cases, however—including where counsel is absent during a critical stage of the proceedings—prejudice to the defendant is presumed. *Id.* at 692 ("Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance.") (citing *Cronic*, 466 U.S. at 659 & n.25). In such cases, prejudice to the defendant "is so likely that case-by-case inquiry into prejudice is not worth the cost." *Strickland*, 466 U.S. at 692 (citing *Cronic*, 466 U.S. at 658). This analysis applies not only when counsel was completely absent but also when "the surrounding circumstances made it so unlikely that any lawyer could provide effective assistance that ineffectiveness was properly presumed without inquiry into actual performance at trial." *Cronic*, 466 U.S. at 661.

The Court elaborated on this reasoning in *Cronic* by describing several instances in which prejudice need not be evaluated, including when counsel is "either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *Cronic*, 466 U.S. at 659 & n.25. Such cases suffer from "'constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'" *Id.* at 659 (quoting *Davis* v. *Alaska*, 415 U.S. 308, 318 (1974)). Among the examples cited in *Cronic* itself was *Hamilton* v. *Alabama*, 368 U.S. 52 (1961), in which the Court held that a conviction must be reversed when the defendant was denied counsel at an arraignment because—even though the defendant did not plead guilty—an arraignment or plea hearing is a proceeding where available defenses or other rights might be irretrievably lost. *Id.* (citing *Hamilton*, 368 U.S. at 55); *accord Iowa* v. *Tovar*, 541 U.S. 77, 81 (2004) ("[t]he entry of a guilty plea . . . ranks as a 'critical stage' at which the right to counsel adheres") (citing *White* v. *Maryland*, 373 U.S. 59, 60 (1963)); *Bell* v. *Cone*, 535 U.S. 685, 695-96

(2002) (proceedings are "presumptively unfair" if the accused "is denied the presence of counsel at 'a critical stage,'" a phrase used "in *Hamilton* v. *Alabama* and *White* v. *Maryland* to denote a step of a criminal proceeding, such as arraignment, that held significant consequences for the accused") (citations omitted); *accord Childress* v. *Johnson*, 103 F.3d 1221, 1231-1232 (5th Cir. 1997) (applying *Cronic* and granting a writ of habeas corpus under Section 2254 when defense counsel functioned as the equivalent to standby counsel at a plea hearing).

Against this backdrop, the Court's decision in *Hill*—which the State repeatedly invokes in its petition—obviously does not require application of *Strickland* in every right-to-counsel case that relates to a plea hearing. Although *Hill* did involve a plea hearing, it did not concern either the absence of counsel or a structural defect in the proceedings that prevented counsel from providing adequate representation to his client. To the contrary, the defendant's claim was that the attorney—who was present the entire time—made specific mistakes, including in his advice regarding the timing of the defendant's parole eligibility. *Hill*, 474 U.S. at 60. It was these specific errors that the *Hill* Court subjected to the prejudice requirement in *Strickland*.

Indeed, *Hill* itself echoed the reasoning the Court gave for the prejudice requirement in *Strickland*. The Court's decision in *Hill* explains that the prejudice analysis is fraught with difficulty because errors by counsel "come in an infinite variety" and "cannot be classified according to likelihood of causing prejudice." *Hill*, 474 U.S. at 57-58. These "errors" are often strategic decisions. Whether any specific act or omission is strategic or inappropriate is difficult to determine. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.* at 58. Accordingly, the "additional 'prejudice' requirement [from *Strickland*] was based on [a] conclusion that '[an] error by counsel, even if professionally unreasonable, does not

warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.'" *Id.* at 57. Thus *Hill* too makes clear that the prejudice requirement applies to specific errors or mistakes by counsel.

Here, the Seventh Circuit concluded that Van Patten's claim did not present the sort of specific error or mistake that must be assessed under *Strickland*. Rather, the court held that the unique circumstances of Van Patten's plea hearing amounted to the denial of counsel altogether. As this Court held in *Cronic*, the prejudice requirement does not apply when counsel was absent or when the surrounding circumstances were such that no lawyer could have provided adequate representation. 466 U.S. at 656 n.16. The Seventh Circuit's decision is not in conflict with any decision of this Court or of any other federal court of appeals. There is no need for this Court to intervene.

II. The Seventh Circuit properly concluded that the Wisconsin Court of Appeals' application of the *Strickland* prejudice requirement was contrary to clearly established federal law.

The State's position is also incorrect on its merits. Essentially, the State argues that the Seventh Circuit exceeded its authority under 28 U.S.C. § 2254 because it awarded relief despite the fact that this Court has never specifically held that participation by speakerphone amounts to the deprivation of counsel under *Cronic*. Pet. at 16-23. Put another way, the State contends that a "novel" factual situation like this one (Pet. at A1) can never give rise to a claim under Section 2254. Pet. at 15. As discussed below, this is too narrow an understanding of the habeas statute. Nothing in Section 2254 limits this Court's cases to their specific facts.

Under the Antiterrorism and Effective Death Penalty Act of 1996, a federal court may not grant a petition for federal habeas relief based on a claim addressed by the state courts unless it finds that the state courts'

adjudication of the claim is "contrary to, or involve[s] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d).

But Section 2254(d) does not require a petitioner to identify a Supreme Court case factually identical to his own. As this Court has explained, "clearly established Federal law" under Section 2254(d)(1) "is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer* v. *Andrade*, 538 U.S. 63, 71-72 (2003). A legal principle that is both "clear" and "established" may also cover various factual situations. That a case enunciating the relevant legal principle contains slightly different facts from a subsequent case does not remove the clarity of the legal principle stated. *Lockyer*, 538 U.S. at 72-74 (determining that, although much of the Eighth Amendment jurisprudence was unclear, the "gross disproportionality" principle and its applicability to sentences for terms of years was "clearly established"); *see also Williams* v. *Taylor*, 529 U.S. 362, 391 (2000) (the case-by-case examination required by *Strickland* "obviates neither the clarity of the rule nor the extent to which the rule must be seen as 'established'"); *id* at 382 (Stevens, J., concurring) (noting that legal principles are clear for purposes of habeas review "even when they are expressed in terms of a generalized standard rather than as a bright-line rule").[3]

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[3] Justice Stevens, writing for three other justices, has highlighted the inappropriateness of an argument similar to what the State now advances. Requiring decisions to match both legally and factually before there is a "clearly established" rule creates an absurd result. Under this logic even *Strickland* would not be clearly established for purposes of an ineffective assistance of counsel claim, "since that case, which established the 'controlling' rule of law on the issue, contained facts insufficient to show ineffectiveness." *Williams*, 529 U.S. at 377 n.9 (Stevens, J., concurring).

This Court has explained that a state court decision is "contrary to" Supreme Court precedent if the state court "applies a rule that contradicts the governing law set forth in [Supreme Court] cases" or "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [Supreme Court] precedent." *Williams*, 529 U.S. at 405-406. "[F]actual contexts of cases may be regarded as 'materially indistinguishable,' because their legal implications clearly are the same, notwithstanding that the facts themselves are significantly different." 2 RANDY HERTZ & JAMES S. LIEBNAM, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 1594 n.24 (5th ed. 2005); *Ramdass* v. *Angelone*, 530 U.S. 156, 180 (2000) (O'Connor, J., concurring) (providing an example of factually disparate situations that could be understood as "materially indistinguishable").

Although this Court has not addressed the precise situation of a lawyer's participation at a plea hearing by speakerphone, this Court *has* addressed the denial and constructive denial of counsel, and it has prescribed a legal framework to govern such claims. *See Cronic*, 466 U.S. at 659-60. The Constitution guarantees a criminal defendant the "guiding hand" of an attorney through every stage of the proceedings against him. *Powell* v. *Alabama*, 287 U.S. 45, 53 (1932). It is clearly established that an inmate whose counsel was absent from a critical stage of the proceedings need not show prejudice in order to obtain relief from his conviction. *Cronic*, 466 U.S. at 659. This analysis applies not only when counsel was completely absent from a critical stage in the proceedings but also when "the surrounding circumstances made it so unlikely that any lawyer could provide effective assistance that ineffectiveness was properly presumed without inquiry into actual performance at trial." *Id.* at 661. And there can be no doubt that a plea hearing is a critical stage of the proceedings—particularly where, as here, the defendant entered a plea of no contest and thus gave up his right to further proceedings with regard to his guilt.

See Hamilton v. *Alabama*, 368 U.S. 52, 55 (1961) (when an accused enters a plea "without having counsel at his side," the court does not "stop to determine whether prejudice resulted"), *cited in Cronic*, 466 U.S. at 659 n.25.[4]

Under the particular facts of this case, the Seventh Circuit properly concluded that counsel's participation by speakerphone amounted to a "constructive absence" from the plea hearing and violated Van Patten's rights under *Cronic*. Pet. at A8-A12. Van Patten stood alone in the courtroom before the judge and prosecutor. He could not turn to his lawyer for a private discussion or to share any last-minute misgivings about the plea. His lawyer was not in a position to observe his demeanor or to detect non-verbal clues about whether Van Patten was confused about something or was having second thoughts. No one had asked Van Patten's consent to proceed in this fashion, and no arrangements had been made in advance for him to be able to consult with his counsel privately during the hearing. The judge's suggestion that a private consultation could "perhaps" be provided did little to solve the problem here. Indeed, it put the burden on Van Patten to make a special request for such a consultation from the judge whom he anticipated would be imposing his sentence. The circumstances of this hearing were such that the likelihood of "effective assistance" was "so small that a presumption of prejudice is appropriate." *Cronic*, 466 U.S. at 659-60. Thus the Seventh Circuit correctly concluded that counsel had been "constructively absen[t]" under the circumstances. Pet. at A12.

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[4] The State's contention that counsel is not necessary at a plea hearing is bizarre and unfounded. Pet. at 18-19. A defendant's right to counsel is not limited to proceedings in which there will be cross-examination. *Id.* Indeed, it is simply incorrect to suggest that it is "not even clearly established that *Cronic* applies at all in the context of a guilty or no-contest plea" (Pet. at 17), given that *Cronic* itself cited *Hamilton*—a plea hearing case—as an example of precisely the circumstance in which the Court would not stop to assess prejudice. 466 U.S. at 659 n.25.

This claim—by its nature—must be assessed under *Cronic* rather than *Strickland*. The Seventh Circuit carefully considered Van Patten's claim and concluded that it was focused on a structural problem with the representation, not on a specific legal judgment that could be evaluated under *Strickland*. The court noted, for example, that Van Patten had not complained "that his attorney botched his defense through bad legal judgments, or misinformed him of the ramifications of his plea." *Id.* at A9. The specifics of counsel's performance were "beside the point if the attorney is prevented by the design of the proceeding from providing the full benefit of his skills when his client needs them most." *Id.* Thus this is a *Cronic* case, and Van Patten is entitled to relief without first having to establish that counsel's absence caused him specific prejudice. The state court's decision was contrary to Supreme Court precedent in that it chose to evaluate Van Patten's claim under *Strickland* instead. *See Williams*, 529 U.S. at 397-98 (state court decision may be "contrary to" Supreme Court precedent if the state court chooses the wrong legal rule to apply to the facts of a particular case before it).

The State does not seriously argue that the defect in these proceedings was a specific *Strickland*-like mistake by counsel, rather than a fundamental structural problem. Indeed, it seems that the State's real concern is whether the facts of this case present a constitutional claim in the first place. Pet. at 21-22 (arguing that none of the circumstances here "justifies finding any error, much less error meriting habeas relief"). But the question the State has framed in its petition is not whether an appearance by speakerphone is a constitutional error in the first place. The state court here did not misapply *Cronic*. It did not apply *Cronic* at all.[5] For that reason, the question the

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[5] In any event, the state court's refusal to find a constitutional violation under *Cronic* on these facts would have been an "unreasonable application" of Supreme Court precedent. 28 U.S.C. § 2254(d)(1). An unreasonable application occurs when

State has framed in its petition is whether, for purposes of Section 2254, the state court rendered a decision contrary to clearly established federal law when it relied on *Strickland* rather than *Cronic* to analyze Van Patten's claim. Pet. at i (questions presented). "For purposes of distinguishing between the rule of *Strickland* and that of *Cronic*, this difference is not of degree [of the error] but of kind." *Bell* v. *Cone*, 535 U.S. 685, 697 (2002). There is nothing new about the notion that a defendant has a right to have counsel present at his plea hearing, and thus there was nothing inappropriate about the Seventh Circuit's grant of relief in this case.

In any event, the State's position is undercut by its citations to *Kane* v. *Garcia Espitia*, 126 S. Ct. 407, 408 (2005) and *Lockyer* v. *Andrade*, 538 U.S. 63, 72-74 (2003). In *Kane*, this Court considered whether it was clearly established that a pro se defendant had a right to access a law library to prepare his defense. The Court specifically

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the state court identifies the correct legal rule but unreasonably applies it to the facts of a particular case, or when, "under clearly established federal law, the state court was unreasonable in refusing to extend the governing legal principle to a context in which the principle should have controlled," *Ramdass* v. *Angelone*, 530 U.S. 156, 166 (2000) (plurality). Counsel's participation by speakerphone was not authorized by the relevant state statutes and—for all the reasons discussed by the Seventh Circuit—put the lawyer in a position where he could not possibly render effective representation to his client. Perhaps there are other factual circumstances where remote lawyering could be sufficient—for example, if the client had consented to proceed despite his lawyer's physical absence and if more comprehensive safeguards were put in place to ensure that the client's interests were adequately protected. But on the facts of this case, the state court's refusal to find a constitutional violation would have been unreasonable under *Cronic*. *See Yarborough* v. *Alvarado*, 541 U.S. 652, 666 (2004) (noting that "[c]ertain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt").

noted that "federal appellate courts have split on whether *Faretta* [v. *California,* 422 U.S. 806 (1975)], which establishes a Sixth Amendment right to self-representation, implies a right of the *pro se* defendant to have access to a law library." *Kane*, 126 S. Ct. at 408 (per curiam). As evidenced by the circuit split, there was no clearly established right to access to a law library at that time, and the Supreme Court refused to "imply" such a right in a habeas proceeding. *Id.* Here, by contrast, it is the factual scenario—not the right itself—that was "novel." Unlike in *Kane*, there is no serious debate here about whether the Constitution guarantees the right to have counsel present and in a position to provide advice, support, and zealous advocacy as the defendant surrenders his constitutional rights. The fact that this particular defendant was denied the assistance of counsel in a new and unique way does not mean that his rights were not "clearly established."

The State's citation to *Lockyer* fares no better. This Court acknowledged in *Lockyer* that its Eighth Amendment jurisprudence was neither "clear" nor "consistent" regarding what factors should be considered in determining whether a sentence was "grossly disproportionate." 538 U.S. at 72. And the Court cited numerous opinions that directly pointed out its lack of clarity in this area—a lack of clarity that made the state court's resolution of the issue a reasonable choice based on the established law at the time of its decision. *Id.* at 72-73.[6] In contrast, there is no lack of clarity with the *Strickland* and *Cronic* decisions. This Court has held that the absence or constructive absence of counsel from a plea hearing is presumptively prejudicial, and the fact that it has not applied that standard to precisely these facts is not a bar to relief.

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[6] In spite of this lack of clarity, this Court did find its general disproportionality principle to be "clearly established [Federal] law." *Lockyer*, 538 U.S. at 73.

III. The Seventh Circuit did not substitute its own factual conclusions for those of the state courts.

The State's arguments about the Seventh Circuit's factual discussion also provide no basis for upsetting the decision here. As discussed below, the factual determinations about which the State complains relate generally to whether Van Patten could demonstrate prejudice or could defend against a harmless error analysis. But as the Seventh Circuit recognized, neither prejudice analysis nor harmless error analysis is appropriate here, as a matter of law.

For example, the State claims that the Wisconsin trial court held that Van Patten would have entered the same plea had counsel properly appeared. Pet. at 24-25. Rather than make a factual determination on whether Van Patten suffered prejudice, however, the Seventh Circuit correctly noted that where counsel is constructively absent from the proceedings, prejudice is presumed. Pet. at A9 (citing, *inter alia, White*, 373 U.S. at 60 (noting that "when [a] defendant enters a plea outside the presence of counsel, "we do not stop to determine whether prejudice resulted: 'only the presence of counsel could have enabled [the] accused to know all the defenses available to him and to plead intelligently'")). While the court stated that it "cannot know what Van Patten might have done had he been treated like any other defendant with counsel at his side" (Pet. at A9), that was obviously a comment on why prejudice is not required—not a conclusion that the state court was wrong in finding the prejudice requirement unsatisfied.

Next the State takes issue with the Seventh Circuit's assertion that "[i]f Van Patten wished to converse with his attorney, anyone else in the courtroom could effectively eavesdrop." Pet. at 25 (citing Pet. at A8). But this observation—based on common sense and the plea hearing transcript itself—does not conflict with any factual finding by the state courts. Indeed, the State does not identify any state court factual finding on this subject at all. Pet.

at 25-26 (citing transcripts rather than state court decisions). Furthermore, the Seventh Circuit's recounting of the events of the plea hearing does not even contradict anything in the record. The Seventh Circuit did nothing more than recite the fact that Van Patten was using a speakerphone and he could only have a private conversation if he made a special request to do so. Pet. at A8 (recounting the proceedings described in Pl. Hrg. 6); *see also supra* Part I.A.

Finally, although the State repeatedly asserts the Seventh Circuit relied on "debatable inferences," it is unclear what these supposedly "debatable inferences" were. The Seventh Circuit simply discussed the practical implications of having counsel participate in a hearing by speakerphone. Pet. at A8, A11-12 (commenting that an attorney participating by speakerphone might not be paying attention, might not be in a able to share crucial information with his client, is not available for private consultation, and would not be in a position to observe the defendant's demeanor and clues about his level of understanding). The State cites no authority for the proposition that a federal court may not consider the potential impact of the surrounding circumstances in addressing a right-to-counsel claim under Section 2254.

CONCLUSION

Further review in this case is unwarranted. The Seventh Circuit's decision does not present any unresolved or controversial issue of law, and the State has not even attempted to establish a conflict of authority. The Petition should be denied.

Respectfully submitted.

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